

CC: Renata B. Hesse  
Antitrust Division  
U.S. Department of Justice  
601 D Street NW  
Suite 1200  
Washington, DC 20530-0001  
Fax: 1-202-307-1454 or 1-202-616-9937  
E-Mail: microsoft.atr@usdoj.gov

CC: U.S. District Judge Colleen Kollar-Kotelly  
Tel: (202) 354-3340

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Tunney Act – Submission of Public Opinion  
Civil Action Nos. 98-1232 and 98-1233

Please file these comments in the Federal Registry as pursuant to the Tunney Act.

After thoroughly reading the Microsoft vs. Department of Justice settlement, I find it to be a political settlement that is not at all in the public's interest. As the US Department of Justice takes the side of Microsoft, and not the side of the American entrepreneur it is publicly endorsing Microsoft's unethical, predatory, illegal and monopolistic behavior. Microsoft has already been found to be guilty of these things in a US Court of Appeals, and the Department of Justice completely overlooks this.

The US Department of Justice's settlement will make things worse for competitors of Microsoft, like myself, because it says, "Microsoft's behavior does not warrant serious action and does not matter." The Department of Justice is painting a model of acceptable business ethics in the outline of Microsoft's behavior and it is accepting, endorsing, and condoning such behavior.

According to the DoJ's Competitive Impact Statement, the DoJ settlement aids in:

Creating the opportunity for software developers and other computer industry participants to develop new middleware products that compete directly with Microsoft by requiring Microsoft to disclose all of the interfaces and related technical information that Microsoft's middleware uses to interoperate with the Windows operating system.

I am a software developer competing directly with a Microsoft product (Microsoft Operations Manager), and I am unsure what "software developers" the DoJ is referring to, because it certainly isn't me.

Microsoft's fundamental powers reside in the following principals:

1. Microsoft's core business model is the "embracing and extending" of third party or publicly originated standards, ideas, designs, and technologies.
2. Through court described "monopoly maintenance," Microsoft has been able to create and maintain several monopolies in software markets including operating system software and office suite software.
3. Microsoft can sit around and wait for new things to happen. They wait for others to do the hard work of inventing, proving, and designing a concept. Microsoft then copies and integrates these features into one of its monopoly products. A typical entrepreneur has to spend 3 years or more proving a new product before it can get to even 10% market share. By virtue of it's existing monopoly, Microsoft can copy someone else's work, and have a monopoly in that new market within 6 months. It is this case that the Sherman Act was created, and it is this problem that a US Court of Appeals found Microsoft guilty on all major counts.

Microsoft most certainly does not innovate, develop, or create original concepts or ideas. Not one of Microsoft's successful products was invented or created by the company. Consider the word processor, spreadsheet, presentation software, command prompt, operating system, publisher, e-mail client, scheduler, web browser, mouse, window, GUI, database, SQL Server, or any of the other Microsoft tools you may use. Microsoft didn't invent even a single one of these. They copied the ideas from other companies. The patent system is supposed to protect entrepreneurs from this kind of thing, but it is failing miserably in this case.

The reality is, most entrepreneurs in the software industry have a mutual respect for each other and their work. They want their work to be appreciated and respected and they sometimes copy each other ideas, but never to the breadth, depth, and scale that Microsoft does.

After agreeing to the settlement with the Department of Justice, Microsoft's Chairman, Bill Gates, went on camera and promised to "act more responsibly" with partners and competitors.

I wish to illustrate the problems with Microsoft a software entrepreneur has by focusing on an existing fact, and an existing problem we are having with the company. For the benefit of the judge and the public I will try to make this example issue as simple and clear as possible. First, a description of the problem: In Windows NT 3.5, Microsoft allowed networking software to have up to 100 network connections waiting on "backlog". The number of backlog connections is critical in determining how well a given piece of networking software can work.

With the release of Windows NT, 2000, and XP, Microsoft made the number of allowed connections on Workstation (Desktop) versions of its software 5. And Server versions of the software can have up to 200 backlogged connections. The following picture shows this:

Microsoft Product	Number Backlog Connections
Windows NT 3.5	100
Windows 95x	5
Windows NT 4.0 Workstation	5
Windows NT 4.0 Server	200
Windows 2000 Professional	5
Windows 2000 Server	200

This in and of itself is actually quite harmless. It seems like a perfectly fine way to try and differentiate your products. Buy the more expensive server products and you get better backlog connections and you can create better network software, right?

First let me explain that there is no difference in programming an operating system that supports 5 or 200 backlog connections. It is simply a number that you change and it may use a little bit more memory but there is no technical or labor related issue to change this number.

The troubling part becomes visible when you ask yourself, how does Microsoft networking software on Workstation, 95x, and other operating systems create these kinds of connections? These products, when running on workstation/desktop versions must be subject to the same limits, correct? We setup, as a trial case, IIS on Windows 2000 Professional (Workstation version with a backlog limit of 5) and we hammered it with parallel requests. We could take bring the IIS down, but it was far beyond the limit of 5 backlogged connections. Our product, which uses the connection backlog, in its most simple test case, can barely handle a single user session before starting to drop connections (kind of like when you visit a web site that is down).

So the troubling question is, if our software is limited to 5 connections on Workstation versions of Microsoft software, why isn't Microsoft's competing software limited to the same?

I am an open-minded person and wanted to give Bill Gates the benefit of the doubt. So the week of November 20, 2001 several weeks after his "we will work better with everyone" public statement, I contacted Microsoft. In fact, I contacted Microsoft Premium Support Services and opened a paid, premium incident based on my troubling example issue. Maybe it is just our software I kept thinking? Microsoft wouldn't intentionally block our software from running well, while allowing Microsoft software to work well would they?

I told premium support services that if they find a solution, I would happily pay the price to provide me with it. Most software companies would be thrilled to be treated as well as I was treating Microsoft. This is an absolutely real case. The support incident was assigned SRX011114602 in Microsoft Windows 2000 Premium Support Services. After spending three quarters of a day on hold, working through 14 people in Microsoft support I did eventually reach people skilled enough to at least understand the problem. Once I reached these people, the "Technical Router" (the person responsible for the incident) said that more senior people had agreed to take up the incident, and they won't be charging me for it. He marked it closed, even though I was being very clear that it wasn't.

Microsoft's Premium Support Service response was the following:

- They acknowledge the limit, and that my software was subject to it.
- They don't know how their web server is able to avoid the backlog limit on Workstation software, and if they did know, they wouldn't tell me.
- They said the API I was using was the lowest level API that Microsoft was willing to provide me with.
- I followed up the next day and got an arrogant response from the Technical Router "I can't give you contact information to the person helping you."
- The person that was providing information said they would get back to me on it. It's more than a week later now, and not a peep.

The net effect is that Microsoft can sell networking software that runs on Workstation versions of their platform that cost ~\$200, but my networking software, by virtue of the enforced backlog limit, and the limited API they are providing, *requires* a Server version of Windows, costing \$1000 or more. By virtue of its monopoly and by virtue of blocking the APIs from us Microsoft has added \$800 to the cost of my product, and I am forced to compete with Microsoft with this monopoly created, anti-competitive, and unavoidable cost disadvantage.

This is one specific example of many problems we have with Microsoft, on an on-going basis. We have many ways around this, and are working with our customers to make special concessions in order to insure the cost of a Server license doesn't impact them. Some of them have been absolutely wonderful and offered to purchase Server versions outright, and I thank them and solute them. There is a wonderful team spirit in the world outside of Microsoft that works to handle and deal with the problems and issues it creates.

I submit that the Department of Justice's settlement does not even remotely address these issues in an effective manner. We have many other such problems with Microsoft. Microsoft does not understand what it means to be an ethical, effective, and responsible member of the business community. It doesn't understand how to be an asset to society. These are very basic values that my engineering professors taught me at the University of Florida. It is a shame Bill Gates didn't finish college, as I am sure his professors at Harvard would have taught him the same.

Because his education in working ethically and in fairness with people fell short, it is up to the government to correct the problems he has created.

Some of the possible solutions to the Microsoft monopoly:

1. A complete, unrestricted release of the Windows source code to any competing third party ISV that requests it, including the right to create derivative works from the source (but not necessarily to create a new operating system, just to make our applications work better), *or*
2. A break-up of the company into two companies, and Application company and an Operating System company, *or*
3. The creation of a new intellectual property mechanism that can protect entrepreneurs in the software market while their software comes to life, they win investment, and they develop the market. This mechanism should allow start-ups to compete amongst themselves, but companies with monopolies like Microsoft should not be allowed to develop for or enter these markets for an extended amount of time (I recommend a period of 7 years).

In solution 1, this would solve the problems without a structural remedy. There is a rumor that Windows may include unlicensed or ambiguously obtained source code, such as source code from projects created at universities (without obtaining permission from the university), and source code licensed under the GPL. This is a totally unsubstantiated claim, and I would be surprised if it is true, but I have

heard it talked about. True or not, it does represent one plausible explanation as to why Microsoft is so protective of it's source and why it is unwilling to make it easier for third parties to create great applications on their platform.

Solution 2 would also actually help level the playing field as application developers would no longer have to be in bed working with their biggest ally at the same time as divulging everything to their biggest competitor.

Solution 3 is what I favor, because all of us entrepreneurs are smart, we just need a little shelter in the open market for a time before Microsoft can come in and steal our ideas from us. We need a fighting chance to get to the *up* phase of start-up.

***The one solution we can't have is the Bush Administration's political settlement.***

The Swiss cheese like settlement the Bush administration made with Microsoft will make things worse. I feel it is also important to disclose that I have heard rumors that George Bush owns a great deal of Microsoft stock. This raises interesting questions. But more importantly it means the Bush Administration's settlement is colored and born of a huge conflict of interest.

I would like to take this opportunity to thank the many state attorney generals and members of the Department of Justice that did not sign on to the settlement. I want you to know that we appreciate the hard work and time spent trying to truly solve this very real problem. I am sorry the Bush administration has turned it's back on America's software entrepreneurs, I won't be voting for them again.

I am not seeing the America I grew up as a kid in Bar Harbor, Maine believing in. The America I know is a country of fairness, free enterprise, and the reasonable availability of opportunity. We need to restore competition, free enterprise, and the reasonable availability of opportunity in the software market if we wish America's high tech industry to continue to be great.

If we don't, we will become an America, without an American Dream.

Regards,



Kyle Lussier, [lussier@autonoc.com](mailto:lussier@autonoc.com)  
President, AutoNOC  
Tel 770 222-0991 x15 Fax 770 222-0998  
<http://www.AutoNOC.com>